

MOTION FILED
SEP 29 1976

IN THE
Supreme Court of the United States

October Term, 1976

No. 76-307

JOHN J. WOLERY,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

**Motion and Brief of Amicus Curiae, "Association of
Trial Lawyers of America", in Support of Petition
for Writ of Certiorari.**

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

The Association of Trial Lawyers of America hereby respectfully moves the Court for leave to file the attached Brief *Amicus Curiae* in this case. The consent of the attorney for the Petitioner, Donald Lynn Billman, has been obtained. The consent of the attorneys for the Respondent, William J. Brown, Attorney General of Ohio and George C. Smith, Franklin County, Ohio, Prosecutor, has been requested but no response has been received and therefore it must be assumed that consent is refused.

MEMORANDUM IN SUPPORT OF MOTION.

Interest of the Amicus.

The Association of Trial Lawyers of America, is a national bar association of over twenty-five thousand trial lawyers throughout the United States in all fifty States dedicated to the preservation of the American system of justice founded upon a heightened sense of respect for the American legal heritage.

This Brief *Amicus Curiae* is filed in support of the Petition for Writ of Certiorari to the Supreme Court of Ohio filed on behalf of the Petitioner John J. Wolery, an Attorney at Law and also filed on behalf of all attorneys and defendants in criminal cases who are represented by those attorneys who will be adversely affected should the decision below not be reversed by this Court.

The Association of Trial Lawyers of America requests that this Court grant the Petition for Writ of Certiorari to review the shocking conduct of prosecutors and police subverting the protections enunciated in *Miranda*.

Further, the inequity created by some states allowing convictions on the uncorroborated testimony of a self-confessed alleged co-conspirator cries out to be corrected.

The Amicus, Association of Trial Lawyers of America, seeks leave to represent and speak for all attorneys and defendants throughout the United States who may

well find themselves in the same situation into which this Ohio criminal defense attorney was thrust by improperly acting state prosecutors and police.

For these reasons the Amicus, Association of Trial Lawyers of America, respectfully seeks leave of this Honorable Court to file the attached Brief *Amicus Curiae*.

Respectfully submitted,

EDWARD I. POLLOCK,

*For and In Behalf of The Association
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Amicus Curiae.*

THOMAS M. TYACK,
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BRIEF AMICUS CURIAE.

The Amicus Curiae, The Association of Trial Lawyers of America, herein respectfully submit their Brief in support of the Petition submitted on behalf of Petitioner John J. Wolery. By this Brief the Amicus urge the Court to grant the Writ sought because of the general importance of the case as the questions presented go to the roots of our concepts of American criminal jurisprudence and our concepts of justice.

Note.

The Opinion Below, Jurisdictional Statement, Questions Presented, Constitutional Provisions Involved, and the Statement Of The Case are omitted from this Amicus Curiae Brief since they are amply stated in the Petition by Attorney Donald Lynn Billman.

ARGUMENT.

To Allow Prosecutors to Obtain and Introduce Uncorroborated Testimony of Known Self-Confessed Criminals and Alleged Co-Conspirators, Procured by Intentional Subversion of Miranda Protections, Is a Violation of Due Process of Law and Equal Protection of Law and Results in a Chilling Effect Restricting the Ability of Criminal Defendants to Obtain Representation by Counsel.

The Court below held that it was not prejudicial for the Franklin County, Ohio Prosecutor to solicit the testimony of self-confessed career criminals then under arrest, various stages of indictment and awaiting sentencing in state and federal courts, by plea bargaining directly with the defendants without the knowledge of their attorney. Such conduct is a clear violation of Standard 4.1(b) of the American Bar Association Minimum Standards for Criminal Justice which provides:

"It is unprofessional conduct for a prosecutor to engage in plea discussions directly with an accused who is represented by counsel, except with counsel's approval."

Far more serious than the clear breach of ethics was the prosecution's twisting of the protections enunciated in *Miranda v. Arizona*, 384 U.S. 436 (1966). The import of *Miranda* is clear. A criminal defendant must be apprised of his rights or any evidence obtained thereafter is inadmissible. *Miranda* extends protection to criminal defendants and was not intended as a

"whip" to be used by prosecutors to coerce testimony of alleged co-conspirators one against the other.

The witnesses recruited by the Ohio prosecutors were "guaranteed immunity from prosecution" by the device of deliberately violating the proscriptions set forth in *Miranda*. The behavior of the Ohio prosecutors is a clear subversion of the law. In *Mapp v. Ohio*, 367 U.S. 643, 659 (1961), Mr. Justice Clark, in delivering the opinion of the Court warned that:

"Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. As Mr. Justice Brandeis, dissenting, said in *Olmstead v. United States*, 277 US 438, 485, 72 L ed 944, 959, 48 S. Ct. 564, 66 ALR 376 (1928): 'Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy'."

The subversion of law practiced by the Ohio prosecutors has produced the most unreliable evidence imaginable. The witnesses, in return for a grant of immunity from convictions and probable life sentences, were induced to give evidence against their own attorney.

In *Estes v. Texas*, 381 U.S. 532, 542-543 (1965), it was held that:

"It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Neverthe-

less, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process."

To sanction the conduct of the Ohio prosecutors in obtaining testimony from criminal defendants by subverting constitutional protections in order to prosecute the witnesses' own attorney, must result in a chilling effect on the willingness of attorneys to accept criminal cases.

Here, the uncorroborated testimony of self-confessed criminals of long standing was held to be sufficient for conviction. The inducement for a criminal defendant to save himself from a long term of incarceration by testifying against his own attorney is strong. The temptation for perjury is obvious. The chilling effect on the willingness of attorneys to accept criminal cases can only result in the restricted ability of criminal defendants to obtain adequate and effective representation by counsel. Further, those attorneys who would continue to accept the defense of criminal matters would be inhibited in their efforts, depriving criminal defendants of effective representation.

Conclusion.

The effect of the decision below, in the instant case, on attorneys involved in the representation of criminal defendants makes the issues of this case fundamental to the preservation of our judicial system and those who represent individual defendants within that system.

It is respectfully urged that the Writ of Certiorari be granted for the foregoing reasons and the reasons set forth in the Petition for Writ of Certiorari.

Respectfully submitted,

EDWARD I. POLLOCK,

*For and In Behalf of The Association
of Trial Lawyers of America as
Amicus Curiae.*

THOMAS M. TYACK,

Of Counsel.